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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER;
AND RONALD K. DESOUZA, VICE PRESIDENT OF
STUDENT AFFAIRS, COPPIN STATE COLLEGE,
Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

When a claim of public employer discrimination is brought under 42 U.S.C. §1983, and related civil rights statutes, is a federal appeals court free to disregard state policy, clearly reflected in its statutes and common law, that favors abbreviated limitations periods in public employment disputes and to reject such limitations periods because they govern state administrative actions or because they are too short?

PARTIES

The parties to the proceeding in the court of appeals were James R. Grattan and Adrienne S. Hedman, as appellants, and Calvin W. Burnett, President of Coppin State College; J. Carson Dowell; Edmund C. Mester; and Ronald K. DeSouza, Vice-President of Student Affairs, Coppin State College, as Appellees.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

Calvin W. Burnett, President of Coppin State College, et al. pray that a writ of certiorari issue to review the judgment entered in this case on June 22, 1983, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been reported; it is set forth

in the Appendix to this Petition at App. 16. The opinion and order of the District Court for the District of Maryland is not reported; it is set forth in the Appendix to the Petition at App. 23.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 22, 1983. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, First Amendment

United States Constitution, Fourteenth Amendment

42 U.S.C. §1981

42 U.S.C. §1983

42 U.S.C. §1985

42 U.S.C. §1986

42 U.S.C. §1988

Maryland Annotated Code:

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Article 64A, §33

Article 64A, §§52-54

Session Laws: Chapter 376, Laws of 1983

Code of Maryland Regulations: COMAR 06.01.01.60

Maryland Rules of Procedure, Rule B4

These provisions are set forth in the Appendix at App. 1-15.

STATEMENT OF THE CASE

In June, 1976, administrators at Coppin State College, a predominantly Black, publicly-funded institution governed by a State board, determined not to renew the employment contracts of two untenured administrative employees, the Respondents herein, James R. Grattan and Adrienne S. Hedman (hereafter "the employees"). Shortly thereafter, these employees filed claims of racial discrimination with the Equal Employment Opportunity Commission. Hedman also alleged that she was the victim of sex discrimination.

Seven months later, on February 17, 1977, they brought suit in State court against Petitioners herein, Calvin W. Burnett, the President of Coppin State College, and various other college and state officials (hereafter "the State"). The employees asked the State court to declare, under the Maryland Uniform Declaratory Judgment Act, Md. Code, Courts and Judicial Proceedings Article §§3-401–3-415, that the non-renewal of their employment contracts in June of 1976, had been accomplished in a manner that violated State law and their rights to procedural due process. The State demurred to the Bill of Complaint.

After the demurrer was finally ruled on in 1981 and sustained with leave to amend, the employees filed, on October 13, 1981, an "Amended and Supplemental Bill of Complaint." The amended complaint alleged that both employees were victims of racial discrimination in violation of 42 U.S.C. §§1981, 1983, 1985, 1986 and the Fourteenth Amendment of the United States Constitution and were retaliated against for exercise of their First Amendment rights. Hedman also alleged civil rights claims based on sex discrimination. In response to this new complaint, the State removed the entire case to the United States District Court for the District of Maryland.

At that time, already pending in district court were two separate actions (outgrowths of the EEOC complaints) filed by these same employees against the same defendants claiming unlawful employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

The State agreed to consolidate the cases and moved to dismiss all three as untimely filed. The District Court (Judge Norman P. Ramsey), however, refused to consolidate or to dismiss the Title VII cases and these are still pending in the District Court. App. 40. However, the court did dismiss the removed case in its entirety. The court reasoned that rights and remedies provided by Maryland's Human Relations Law (Article 49B) were most analogous to the asserted federal claims and thus, the limitations period most appropriate for adoption by the district court was Article 49B, §9(a), which requires all employment discrimination complaints to be filed with the Maryland Commission on Human Relations within six months of their occurrence.[1] Since the federal claims were not brought within this period, they were dismissed as not timely filed.[2]

The employees appealed and the United States Court of Appeals for the Fourth Circuit reversed. First, relying

[1] In so doing, the district court followed several earlier Maryland cases involving suits brought under § 1981. *See e.g., McGill v. General Electric Co.*, 524 F. Supp. 1126 (D. Md. 1981). At the time, the Maryland District Courts, like other courts throughout the country, (see Argument, Section II, infra) were divided on the question of whether time periods specified in state fair employment practices laws should serve as limitations periods in federal civil rights actions. *See Evans v. Chesapeake & Potomac Telephone Company*, 535 F. Supp. 499 (D. Md. 1982).

[2] The District Court ruled that the employees' free speech claim was governed by a three-year limitations period but held it barred as well since it was not raised until 1981 and therefore did not relate back to the 1977 complaint. The employees did not appeal this holding to the Fourth Circuit.

upon *McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F.2d 676, 678 (4th Cir. 1983), the court below held the six-month statute of limitations prescribed in Article 49B, §9(a) was not applicable. In *McNutt*, a case decided by another panel of the Fourth Circuit a few weeks prior to oral argument in this case, the court had concluded that Art. 49B §9(a) should not be applied to a private employee's claim of racial discrimination brought under 42 U.S.C. §1981, because the "mixed scheme of administrative and judicial enforcement" in Article 49B was not analogous to a judicial action brought to enforce §1981. 698 F.2d at 678.

In urging the Fourth Circuit to apply §9(a) in the case at hand, the State pointed out, *inter alia*, that the present case, unlike *McNutt*, involved a public, rather than private employee and that the *McNutt* panel had expressly recognized that the policy reasons supporting prompt assertion and prompt resolution of public employee "controversies over discharges, demotions and failures to promote or transfer" were "particularly" acute. 698 F.2d at 678. Further, the State noted that the *McNutt* panel had reached its view that federal courts can only borrow state limitations periods which provide the plaintiff with a purely *judicial* remedy without reference to this Court's decision to the contrary in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981). Even though the employees offered no response to these arguments, the lower court rejected them without comment.

The court below also refused to apply other abbreviated limitations periods urged by the State — limitations periods of precisely the sort which the *McNutt* panel had indicated would be applicable in federal civil rights actions. The *McNutt* court concluded that there was no indication that the Maryland legislature intended the six-month limitation period found in Article 49B §9(a) to be applied to other types of judicial actions involving

private employees: "No Maryland statute specifically addresses the matter" and there is no "decision or body of decisions on the subject" in Maryland. 698 F.2d at 679. However, the *McNutt* court said that if there had been such evidence of state intent, it would have applied a short limitations period: "Had there been in Maryland a decision or body of decisions on the subject . . . we would probably accept them as the common law of the State of Maryland" and apply them pursuant to 42 U.S.C. §1988. 698 F.2d at 679.

The state argued below that in a case involving a public employee, there are both statutes and common law which do, in the words of the *McNutt* panel, "specifically address the matter." Petitioners pointed to a wide body of Maryland statutes and regulations providing public employees their own administrative *and* judicial forum to challenge a discharge by their public employer — all within abbreviated limitation periods, *see infra* at 9-10, as well as an established common law of Maryland requiring a public employee to assert his employment dispute in court in an expeditious fashion. *See Duffey v. Rickard*, 194 Md. 228, 71 A.2d 41 (1950) (5½ months).

The employees' only response was to argue that these statutes and case law do not apply to them because they are not merit system employees. The Fourth Circuit, however, did not reject the statutory and common law limitation periods for public employment disputes on this ground. Rather the court concentrated simply on the length of the limitation periods, noting twice in the space of two paragraphs that these periods were "even shorter" than the period rejected in *McNutt*. App. at 20. The Court then made its own independent and conclusory assessment of the "intent" of the Maryland legislature and found that even though abbreviated limitations periods were mandated by statutes and case law governing the rights of public employees, the legislature could not have

"intended" that a limitations period of this brevity be applied "to civil actions for discrimination." App. at 20.[3] Accordingly, the Court held that the general limitations period of three years for actions for which no other period is specifically provided, Maryland Code, Courts & Judicial Proceedings Art. §5-101, should be applied in "discrimination suits brought under the Civil Rights Acts by employees in public as well as private employment." App. 21.

REASONS FOR GRANTING REVIEW

I.

REVIEW BY THIS COURT IS NECESSARY TO CORRECT A DECISION THAT BOTH UNDERMINES THE LEGITIMATE AND LONG-RECOGNIZED POLICY OF MOST STATES REQUIRING PROMPT ASSERTION AND RESOLUTION OF PUBLIC EMPLOYEE DISPUTES AND CLEARLY DEPARTS FROM CASES OF THIS COURT.

Since Congress did not establish a statute of limitations for actions brought under 42 U.S.C. §1983 and similar civil rights statutes,[4] federal courts are generally required to borrow the state statute of limitations governing an analogous cause of action. *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980). *See also, Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975). In most cases, the state statute of limitations for the most

[3] The Fourth Circuit also rejected the State's alternative argument that the employees claims of race and sex discrimination first raised in their 1981 complaint did not "relate back" to the 1977 complaint and so were not timely filed even if a three-year limitations period was applicable. App. 22. The state does not pursue that argument before this Court.

[4] Respondents below pressed claims under 42 U.S.C. §§ 1981, 1985 and 1986, as well as § 1983, and all of these were dismissed as untimely by the District Court. However, for the sake of simplicity in argument and because a federal court's approach to limitation issues under these statutes would not ordinarily be expected to vary from one statute to another under 42 U.S.C. § 1988, Petitioners will principally refer to § 1983 throughout their petition.

analogous state cause of action is the "binding rule of law" in federal civil rights actions, which can be disregarded only if "inconsistent with the Constitution and laws of the United States." *Board of Regents v. Tomanio, supra,* 446 U.S. at 484-5 and 42 U.S.C. §1988.

Both of these inquiries — the question of what state cause of action for which there is a limitations period is most clearly analogous to the federal civil rights claim and the question of whether that limitations statute is inconsistent with the United States Constitution and federal law — are grounded in considerations of comity and federalism. *See Board of Regents v. Tomanio, supra,* 446 U.S. at 492 ("Considerations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. §1983"). This is so as to the first inquiry because "[t]he ultimate goal is to apply the same limitations period to the federal civil rights action as would be applied if a similar action were brought in state courts." *Warren v. Norman Realty Co.,* 513 F.2d 730, 733 (8th Cir. 1975), *cert. denied,* 423 U.S. 855 (1975); and as to the second, because in order to "gauge inconsistency," a federal court must first identify and thus compare the "federal and state policies which the respective legislatures sought to foster." *Board of Regents v. Tomanio, supra,* 446 U.S. at 487.

The Court of Appeals below mishandled both of these inquiries. In particular, it ignored its duty to place itself in the position of a state court judge and to determine the appropriate state limitations period with full consideration of state statutory and common law and the policies they reflect. In addition, it, in effect, found "inconsistency" without even attempting to articulate the state policies harmed by its decision. This would and should have been a very easy task.

The courts of at least 35 states, including Maryland and the District of Columbia, have had no trouble in articu-

lating a common law rule requiring the employment disputes of public employees to be promptly asserted and promptly resolved. *See,* Annot.: Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943) (and A.L.R. Supplements) which collect more than 100 cases on the subject — some going as far back as 1879.

The Legislatures of most states obviously share this view that public employees should promptly assert grievances and legal actions against their employers, including those involving discrimination charges. For example, Maryland law sets up a scheme under which a classified state employee has 165 days to challenge a termination. *See* Md. Code., Art. 64A, §33.[5] Even unclassified state employees have a specific remedy for an alleged illegal, discriminatory or unconstitutional termination which must be asserted and appealed to court in an even shorter period — 95 days. Code of Maryland Regulations COMAR 06.01.01.60.[6] And Maryland has a host of other statutes which require that various classes of public employees' employment disputes be promptly resolved — Article 27 §§721 and 734 (Law Enforcement

[5] Article 64, § 33 of the Maryland Code provides that when a classified employee (one covered by the State Merit System) is to be terminated or "permanently removed from the classified service," written charges must be filed against him and he must be given an opportunity to be heard in his own defense. *See also* COMAR 06.01.01.61. These charges must be heard within ninety (90) days after filing and a decision on them must be rendered within forty-five (45) days after the hearing. Thereafter, an appeal is permitted to the Circuit Court within thirty (30) days. Md. Rule of Procedure B4.

[6] An unclassified employee who receives a notice of termination has five working days to note an appeal to the Secretary of Personnel who must hear the case within 30 days and render a decision within another 30 days. Thereafter, an appeal to the Circuit Court must be filed within another 30 days. Md. Rule of Procedure B4.

Officers); Education Article §6-202 (Teachers and Principals), §13-1A-01 *et seq.* University of Maryland Employees), §14-110 (Board of Trustees of State Universities and Colleges Employees).

Most significantly, Maryland shares with most states — at least 30 — the establishment by legislation of an abbreviated period for the filing of claims of employment discrimination with a state fair employment practices agency. In Maryland, that period is 6 months. *See* Md. Code, Article 49B, §9(a). Many states have the same filing deadline; some have an even shorter period.[7] Yet, in the

[7] *See* ARIZ. REV. STAT. ANN. § 41.1481 (six-month limitation; employment discrimination); COLO. REV. STAT. § 24-34-403 (six-month limitation; employment discrimination); CONN. GEN. STAT. 31-127 (90-day limitation; employment discrimination); DEL. CODE ANN. Tit. 19, § 712 (90-day limitation; employment discrimination); FLA. STAT. ANN. § 23.167 (six-month limitation; employment discrimination); GA. CODE ANN. § 89-1714 (six-month limitation; employment discrimination); HAWAII REV. STAT. § 378-4 (90-day limitation; discrimination action); ILL. REV. STAT. ch. 68 § 7-102 and 103 (180-day limitation; civil rights violation); IND. CODE ANN. § 34-4-16.5-7 (180-day limitation; political subdivision claim); IOWA CODE ANN. § 601 A.1512) (180-day limitation; employment discrimination); KAN. STAT. ANN. § 44-1005 (six-month limitation; employment discrimination); KY. REV. STAT. 344.200 (six-month limitation; employment discrimination); ME. REV. STAT. ANN. Tit. 5 § 4611 (six-month limitation; employment discrimination); MASS GEN. LAWS ANN. ch. 151B § 5 (six-month limitation; employment discrimination); MICH. STAT. ANN. § 3.548 (601) II(b) (90-day limitation; employment discrimination); MINN. STAT. ANN. § 363.06 (six-month limitation; employment discrimination); MO. ANN. STAT. § 296.040 (180-day limitation; employment discrimination); MONT. CODE ANN. § 49-2-501 (six-month limitation; employment discrimination); NEB. REV. STAT. § 18-1118 (six-month limitation; employment discrimination); NEV. REV. STAT. § 613.430 (six-month limitation; employment discrimination); N.H. REV. STAT. ANN. § 354-A:09 (90-day limitation; discrimination actions); OKA. STAT. ANN. Tit. 25 § 1502 (six-month limitation; employment discrimination); PA. STAT. ANN. Tit. 43, § 960 (90-day limitation; discrimination

face of all this authority to the contrary, the lower court was able to conclude that the Maryland General Assembly "intended" that public employees were to have three years before beginning to litigate a claim of employment discrimination.

What would the lower court have found if it had placed itself in the position of a Maryland Court facing the same discrimination claims brought without resort to the federal civil rights statutes? It would have found that a public employee bringing a claim for a discriminatory firing would have had to file a mandamus action in state court or pursue his or her statutory or administrative remedies.

As to the first remedy, mandamus, in Maryland, this action has as its purpose to correct the abuse of governmental power, particularly illegal, arbitrary and even unconstitutional action. Since the 1850's it has served as a legal route for a public officer or employee to challenge his ouster and regain his position. *See e.g., Miles v. Stevenson,* 80 Md. 358 (1894). Unlike a state court action for private employment discrimination, which would require express statutory authority, *Dillon v. Great Atlantic and Pacific Tea Co.,* 43 Md. App. 161, 403 A.2d 406 (1979), no legislative authorization is needed to confer such a private right of action on a public employee via mandamus. *See, Heaps v. Cobb,* 185 Md. 372, 45 A.2d 73 (1945). (Maryland courts have inherent power by way of mandamus or otherwise to review arbitrary or illegal

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actions); R.I. GEN. LAWS § 28-6-10 (four-month limitation; employment discrimination); S.C. CODE ANN. § 65-2D(1) (six-month limitation; employment discrimination); S.D. CODIFIED LAWS § 20-13-31 (180-day limitation; discrimination action); TENN. CODE ANN. 4-21-117 (180-day limitation; discrimination action); UTAH CODE ANN. 34-35-7(15) (30-day limitation; discrimination action); W. VA. CODE § 5-11-10-90-day limitation; discrimination action); WYO. STAT. § 27-9-106 (90-day limitation; employment discrimination).

governmental action.) And mandamus is an action at law which, like 42 U.S.C. §1983, offers a damage remedy, Maryland Rule BE44, ancillary injunctive relief, Maryland Rule BF, and the right to a jury trial.

If such an employee had brought his or her mandamus action in a reasonably prompt manner, there would be no bar to relief if the claim had merit. However, if the plaintiff, like the respondents in this case, waited nearly eight months before going to court, his or her claim would be barred by laches under the Maryland decision in *Duffey v. Rickard,* 194 Md. 228, 71 A.2d 41 (1950) (Public employee suit time-barred after 5½ months.)

On the other hand, if the plaintiff had access to public employee grievance remedies or claimed employment discrimination proscribed by Maryland's Human Relations Law (Art. 49B), his or her mandamus remedy would be barred by the existence of such alternate remedies. *See Gray v. Warden,* 247 Md. 724, 234 A.2d 603 (1967) (correction guard entitled to removal proceeding under §33 of Article 64A may not obtain relief by way of mandamus). This would be true even if the public employee claimed that his discharge violated the United States Constitution. *State Department of Assessments v. Clark,* 281 Md. 385, 380 A.2d 28, (1977). The plaintiff's only state judicial remedy would be that provided by the particular statutory or administrative scheme. And failure to abide by the time limitations of the grievance procedures or Article 49B would take away any state court remedy he or she might have otherwise had. *See Myers v. Chief of Fire Bureau,* 237 Md. 583, 589-590, 207 A.2d 467 (1965).

Thus, these statutory deadlines and the laches rule of *Duffey v. Richard, supra,* are genuine bars to a state court discrimination action by a public employee; and they would be applicable in the state court proceeding most

clearly analogous to 42 U.S.C. §1983.[8] The same would be true of the statutes and common law laches rules of most states.[9]

The lower court not only rejected long-standing and widespread state policies in determining what state cause of action was most analogous to 42 U.S.C. § 1983, it ignored them in effectively concluding that the proffered state limitations were too short to be consistent with federal law. This issue is common to those raised in the pending petitions for certiorari in *Springfield Township*

[8] Significantly, in a state court action brought pursuant to 42 U.S.C. § 1983 and alleging discrimination against a public employee, the State made the same limitation argument rejected by the *Grattan* court and the Circuit Court dismissed the plaintiff's civil rights claim. *See Darlene S. Cohen v. F. Carvel Payne and the State of Maryland*, Cir. Ct. for Anne Arundel County Law No. 1105000 (Order filed April 20, 1983).

[9] The lower court not only erred in ignoring clear state policy in favor of abbreviated limitations periods for public employees actions and in masquarading its distaste for the state rule in unsubstantiated statements about the "intent" of Maryland Statutes. It further evidenced its misreading of Maryland law in at least two other respects. The appellate panel said that deadlines for state grievance proceedings could not be applied to judicial proceedings because in such cases the grievances are state-initiated and the state bears the burden of proof and of framing the issues (App. 20). This is simply not true for cases involving the termination of unclassified state employees or other types of grievances. *See* COMAR 06.01.03.05. Secondly, the Court below erred in suggesting that a state employee could file a discrimination complaint with the Human Relations Commission without regard to the time limits specified in employee grievance procedures. At least at the time of the lower court decision and before July 1, 1983, a state employee had to timely initiate a grievance proceeding to assert his or her rights under Article 49B. *See* Chapter 376, Laws of 1983 (App. 14). Under the circumstances, the lower court's reading of Maryland law is not entitled to "great deference". *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976).

School District v. Knoll, No. 82-1889, and *Swyka v. Johnson*, No. 82-1928.[10]

This Court, in *Tomanio, required* federal courts to assess the state policies behind limitation statutes in determining "inconsistency" with federal law. And in *Robertson v. Wegmann*, 430 U.S. 584, 593 (1978), the Court said that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." There is nothing "too short" about a six-month limitation period for public employee discrimination cases. Under federal law, a Title VII plaintiff will generally be out of federal court if he did not file a complaint with the Equal Employment Opportunity Commission within six months of the allegedly discriminatory act. 42 U.S.C. 2000e-5(e). And six months is longer than the applicable period in some states for public employee mandamus actions. *See e.g., Austin v. Board of Higher Education*, 186 N.Y.S.2d 1 (1959) (four months); *Anno. — Public Employee — Discharge — Acquiescence*, 145 A.L.R. 767 (1943). In fact, just last term, this Court in a somewhat different context held that a six-month limitations period was an appropriate one for certain disputes between an employee and his union. *Del Costello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (June 8, 1983). Moreover, it is likely that a discharged public employee is thinking of his or her judicial remedies immediately after being terminated — particularly a potential Title VII plaintiff who only has six months to make up his or her mind to pursue a federal statutory claim. Finally, nothing in such a limitation rule runs counter to the twin purposes of deterrence and compensation reflected in 42 U.S.C. §1983.

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[10] For the reasons set forth by the petitioners in *Knoll* and *Swyka* and set forth *infra* by petitioners herein, the decision of the Court of Appeals for the Fourth Circuit is clearly wrong.

Although this case has much in common with the *Knoll* and *Swyka* cases, it is also different in a number of important respects. Unlike those cases, it involves the vexing question of what state cause of action is most analogous to §1983. Moreover, it involves the application *vel non* of an age-old state common law rule, rather than a brand new statute as is *Knoll* and *Swyka*. And it presents for review the question whether a state limitations period set forth in a mixed administrative-judicial scheme can be applied in a federal §1983 action. In fact, the Respondent in *Knoll*, in arguing against review in that case and against the amicus brief filed by Maryland therein, said:

> "The petition in this case [Knoll] does not present those recurring issues. If the issue presented in this case were to arise in a case that presents those additional questions of more general importance, it might in that context warrant review."

Petitioners submit that *this* is such a case and that review is warranted.

II.

THE DEEP DIVISION AMONG THE LOWER COURTS ON THIS CRITICAL QUESTION WHICH RESULTED IN THE UNSANCTIONED HOLDING BELOW SHOULD BE RESOLVED BY THIS COURT.

The question of whether a state statute of limitations can be rejected by a federal court in § 1983 cases for any reason other than a finding that it does not govern the most analogous state cause of action has caused enormous division among the lower courts. Much of that division centers on two unauthorized approaches to this question. Both were adopted by the court below: *i.e.*, refusal to borrow a state statute of limitations, even though that statute governs the state action most analogous to the federal claim, because (1) an administrative rather than judicial remedy is provided in state law or (2) the federal court determines the state limitations period is simply "too short."

As to the refusal to apply an analogous administrative remedy, a number of courts have refused to apply a state statute of limitations governing administrative remedies, like Maryland Code, Art. 49B, §9(a), to a judicial action brought under the Civil Rights Acts. *See McNutt v. Duke Precision Dental and Orthodontic Laboratories, supra,* 698 F.2d 676; *Zuniga v. AMFAC Foods, Inc.,* 580 F.2d 380 (10th Cir. 1978); *Chambers v. Omaha Public School District,* 536 F.2d 222 (8th Cir. 1976); *Mason v. Owens — Illinois, Inc.,* 517 F.2d 520 (6th Cir. 1975); *Waters v. Wisconsin, Steelworks of International Harvester Co.,* 427 F.2d 476 (7th Cir. 1970), *cert. denied,* 400 U.S. 911 (1970). This approach seems clearly at odds with this Court's teachings in *Board of Regents v. Tomanio, supra,* 446 U.S. at 484-5 (most analogous state statute of limitations is "binding rule of law" which can be disregarded *only* if inconsistent with the Constitution and laws of the United States) and in *United Parcel Service v. Mitchell, supra,* 451 U.S. at 62 n.3 ("the fact that an employee could not bring a direct suit [in State Court] . . . does not mean that his §301 [federal] claim . . . is not closely analogous to such an action" and so should not be adopted under any circumstances.)

However, whatever may be the merits of refusing to borrow a state administrative statute of limitations for federal actions in other contexts, it seems clearly inappropriate in cases involving charges of discrimination by a public employee. And, in fact, only one circuit, other than the court below, has refused to apply a state statute of limitations on this ground in an employment dispute involving a public employee. *See Chambers v. Omaha Public School District, supra.* Moreover, there the court paid no attention to the fact that Chambers was a public employee and so there was no acknowledgement of a particularly significant state interest in this area. *See supra,* Argument, §1. Perhaps even more importantly, the

Chambers court based its holding, at least in part, on the fact that application of a short statute of limitations in that case would have barred the plaintiff's First Amendment claim. 536 F.2d at 227. Here, of course, there is no contention that any First Amendment claim is barred by the "short" statute of limitations. Thus *Chambers* is clearly distinguishable from the case at hand.

Moreover, the First Circuit in a series of well-reasoned opinions has expressly recognized that in the area of public employment disputes "important policy reasons" require the application of the limitations period governing the state statute protecting the same rights sought to be vindicated by a federal civil rights action, even if that state statute provides only an administrative remedy. In *Burns v. Sullivan*, 619 F.2d 99, 106-107 (1st Cir.), *cert. denied*, 449 U.S. 893 (1980) the First Circuit held that a Massachusetts statute, nearly identical to Article 49B, which provided that charges of employment discrimination must be filed with the Massachusetts Human Relations Commission within six months, should be applied in a public employee's suit brought under 42 U.S.C. § 1983. The court explained that to apply a three-year limitations period[11] in § 1983 public employee suits would allow "state employees to bide their time and use the federal courts, bypassing the state administrative hearings" resulting in "two unfortunate results":

> "First, the general government policy, observed at both the state and federal levels, of prompt resolution of personnel disputes, will be thwarted. Second, without any showing that state administrative procedures will not provide the plaintiff

[11] The *Burns* court also specifically noted that a general three-year statute of limitations, like that applied by the Fourth Circuit in the case at hand, should only be applied where the state has *not* "provided a specific remedy, complete with statute of limitations for racial discrimination in public employment." 619 F.2d at 107.

with due process and protect against constitutional violations, the federal courts will become surrogate state personnel departments." 619 F.2d at 107.

The First Circuit has consistently followed and indeed, expanded its holding in *Burns* in a number of recent cases. *See e.g., Dewey v. University of New Hampshire*, 694 F.2d 1 (1st Cir. 1982); *Carter v. Supermarkets General Corp.*, 684 F.2d 187 (1st Cir. 1982); *Holden v. Massachusetts Com'n. Against Discrimination*, 671 F.2d 30 (1st Cir.), *cert. denied*, 103 S. Ct. 97 (1982); *Hussey v. Sullivan*, 651 F.2d 74 (1st Cir. 1981). The Court below totally ignored this authority. Indeed, the Fourth Circuit here not only failed to distinguish these cases but it also failed to even address them. This is particularly anomolous in light of the fact that another panel of the Court only a few months prior to this decision at hand expressly recognized that these First Circuit cases were "respectable authority." *McNutt v. Duke Precision Dental and Orthodontic Laboratories, supra*, 698 F.2d at 678.

Aside from the conflict, the holding below presents with the well-reasoned First Circuit decisions as to the applicability of administrative limitations periods to actions brought under the Civil Rights Acts, its reasoning seriously conflicts with the approach adopted by most lower courts. For the Fourth Circuit in this case seems to have refused to apply the statutory and common law abbreviated limitations periods specifically governing public employee disputes, simply because it found those periods "too short." Not only has this approach been expressly disavowed, *Burns v. Sullivan, supra*, 619 F.2d 106-107 (noting short state limitations period "no shorter than six-month period available to federal and state employees under Title VII"); *see also, Garcia v. University of Kansas*, 702 F.2d 849 (10th Cir. 1983); *White v. United Parcel Service*, 692 F.2d 1 (5th Cir. 1982), but also it has not been adopted even by those federal courts which have

chosen a longer state statute of limitations over a shorter one. *See e.g., Beard v. Robinson,* 563 F.2d 331 (7th Cir. 1977); *Shaw v. McCorkle,* 537 F.2d 1289 (5th Cir. 1976); *Peterson v. Fink,* 515 F.2d 815 (8th Cir. 1975), and cases cited *infra* at 20. Not one of these courts rejected a shorter statute of limitations simply because it was "too short."

If such an approach is permitted to stand it could have an enormous effect throughout the country. At least thirty other states have state statutes of limitations of less than one year which could be applied to civil rights actions brought by employees. *See* n.7, *supra.* Each of these states has made a considered decision in balancing the interests of potential plaintiffs and defendants. The Fourth Circuit's decision here obviously undermines the power given to the states by Congress in 42 U.S.C. §1988.

Significantly, the Court below did not cite a single case in support of its momentous decision not to apply abbreviated limitations periods just because they were "too short."[12] The only other court which has taken such

[12] Moreover, the only reason asserted by the employees for rejecting these limitations periods — *i.e.,* the periods were inapplicable to them because they were not merit system employees — was correctly and soundly rejected by the First Circuit in *Holden v. Comm. Against Discrimination, supra,* 671 F.2d at 33:

> "Holden argues that . . . *Burns* should not apply to her because she does not have available [because, although a public employee, she was not appointed as civil servant] the administrative remedies that are contemplated by the statute applied in those cases. The unavailability of the state administrative remedies does tend to violate the policies observed in *Burns.* . . . Nevertheless, the statutes applied in . . . *Burns* are still the 'most analogous' to Holden's claims, and we see no reason to give her a longer limitations period than that available to other public employees in Massachusetts. We do not think that the decision of the Massachusetts legislature not to give certain public employees such as Holden an administrative remedy entitles them to a longer limitations period."

an unorthodox and unauthorized approach in a public employer dispute is the Third Circuit in a recent case which this Court has been asked to review. *Springfield Township School District v. Madelin H. Knoll*, 699 F.2d 137 (3rd Cir. 1983), *reh. denied*, 699 F.2d 137 (3rd Cir. 1983), *petition for cert. filed*, No. 82-1889 (May 20, 1983). (Interestingly, the respondent there, while opposing grant of certiorari in that case, principally on the theory that it involves a peculiar state statute, concedes that "the decisions of the lower courts are in disarray" with regard to the questions raised in the case at hand. Brief of Respondent in Opposition at 6).

Another recent decision containing language arguably supporting such an approach is *Garmon v. Foust*, 668 F.2d 400, 406 (8th Cir.), *cert. denied*, 102 S. Ct. 2283 (1982) ("we . . . reject the tort analogy because it unduly cramps the significance of Section 1983 as a broad statutory remedy.") However, that case, a civil rights action against police officers, did not involve the established public policy in favor of resolving employment disputes of public employees expeditiously as the case at hand does. Moreover, in *Garmon*, since the police officers did not raise it, the *Garmon* Court specifically reserved the question of whether a state statute, which required any person claiming damages against a municipality to commence the action within *six months*, should be applied. *Id.* 668 F.2d at 405 n.9.

The only other cases which in any way support the lower court's holding come from the Tenth Circuit, which has indicated, *in dicta*, that if a substantial question exists as to *which* state statute applies, it will apply the "more generous" limitation period as a matter of policy. *See e.g., Shah v. Halliburton*, 627 F.2d 1055, 1059 (10th Cir. 1980). However, the Tenth Circuit has recently disavowed that position. *Garcia v. University of Kansas*, 702 F.2d 849 (10th Cir. 1983).

In summary, the lower courts are clearly divided in this area; some applying administrative state limitations periods to analogous federal civil rights actions, many refusing to do so; most attempting to apply the most nearly analogous judicial limitations period whatever its length, but a few, the court below among them refusing even to do this. Certiorari should be granted so that this important public policy question can be definitively resolved.

CONCLUSION

No one case could resolve all of the possible limitations issues that could arise in a federal court action under 42 U.S.C. §1983.[13] However, the issue of what limitations period is appropriate is a particularly acute and recurring one in the area of employee discrimination actions brought against states and other public employers. Because so many states have articulated a policy of prompt assertion and resolution of public employment disputes, and because so many are affected by the important questions raised herein, we urge that review be granted and this Court reverse the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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[13] A much longer limitations period might be appropriate in civil rights actions based upon other kinds of constitutional violations. For example, Maryland once had an express three-year statute of limitations for violations of certain State constitutional provisions that protect against physical invasion of personal and liberty interests. *See* Md. Code (1972 Repl. Vol.), Art. 57, § 1.

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Constitution—

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, § 1—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit

juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Con-

stitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

MARYLAND ANNOTATED CODE

COURTS & JUDICIAL PROCEEDINGS ARTICLE

§ 5-101. Three-year limitation in general.

A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

Art. 49B ANNOTATED CODE OF MARYLAND

§ 9. Complaint to be filed with or issued by Commission; meetings of Commission.

(a) Any person claiming to be aggrieved by an alleged discrimination prohibited by any section of this article may make, sign and file with the Human Relations Commission (hereinafter referred to as the "Commission") a complaint in writing under oath. The complaint shall state the name and address of the person, firm, association, partnership, corporation, state agency, department or board alleged to have committed the act of discrimination together with the particulars thereof; and the complaint also shall contain such other information as may be required from time to time by the Commission. A complaint must be filed within six months from the date of the occurrence alleged to be a violation of this article. A complaint filed with the federal or with a local human relations commission within six months from the date of occurrence shall be deemed to have complied with the provisions of this section.

(b) Whenever the Commission has received reliable information from any individual or individuals that any person has been engaged or is engaged in any discriminatory practice within the scope of this article, and after a preliminary investigation by the Commission's staff authorized by the chairman or vice-chairman it is satisfied that said information warrants the filing of a complaint, the Commission, on its own motion, and by action of not less than three commissioners, may issue a complaint in its name in the same manner as if the complaint had been filed by an individual.

(c) The Commission shall meet at least once each month. In addition, the chairman or a majority of the Commission shall have the right at any time to call special meetings of the Commission upon five (5) days notice to the members thereof. The Commission shall establish procedures for the conduct of said meetings.

§10. Investigation; findings; agreement for elimination of discrimination; appeals.

(a) After the filing of any complaint the executive director shall consider the complaint and shall refer it to the Commission's staff for prompt investigation and ascertainment of the facts. The results of the investigation shall be made as written findings. A copy of the findings shall be furnished to the complainant and to the person, firm, association, partnership or corporation (hereinafter referred to as the "respondent"), against whom or which the complaint is made.

(b) If the finding is that there is probable cause for believing a discriminatory act has been or is being committed within the scope of any of these subtitles, the Commission's staff immediately shall endeavor to eliminate the discrimination by conference, conciliation, and persuasion, and shall forward a written copy of the findings of any investigation of a real estate agent or broker to the real estate commission.

(c) If an agreement is reached for the elimination of the discrimination as a result of the conference, conciliation and persuasion the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the Commission setting forth the terms of the agreement. The Commission shall not enter an order at this stage of the proceedings unless it is based upon a written agreement. If no such agreement can be reached, a finding to that effect shall be made and reduced to writing with copies furnished to the complainant and to the respondent.

(d) A denial of the request for reconsideration of a finding of no probable cause by the Commission is a final order appealable to the circuit court as provided in § 255 of Article 41 of this Code provided that the United States Equal Employment Opportunity Commission does not have jurisdiction over the subject matter of the complaint.

§ 12. Enforcement of Commission's orders; complaint maliciously made; right to bring civil action not denied.

(a) If any respondent refuses to comply with an order of the Commission made within the scope of any of these subtitles, the Commission may, represented by its general counsel, institute litigation in the appropriate equity court of the county or in Baltimore City where the alleged discrimination took place to enforce compliance with any of the provisions of this article.

The court, in hearing said case shall be governed by the judicial review standards as set forth in the Administrative Procedures Act, §§ 255-256 of Article 41 of the Annotated Code of Maryland, except that additional evidence if otherwise admissible under the law of evidence, may be presented to the court without the necessity of an application or without the necessity of showing reasons for the failure to present it at the hearing before the Commission.

(b) Any person (including one acting for or on behalf of a firm, association, or corporation) is guilty of a misdemeanor if

(1) He has claimed to be aggrieved under the provisions of this subtitle; and

(2) He has pursued the complaint under §§ 14 and 15 [§§ 11 and 12] of this subtitle, or either of these sections; and

(3) The Commission has found the complaint to be unfounded or has dismissed it without further action against the respondent; and

(4) The court has found the complaint to have been made maliciously; and

Upon conviction thereof in the appropriate criminal court, he is subject to a fine of not more than five hundred dollars, or to imprisonment for a period not exceeding one year, or to both such fine and imprisonment in the discretion of the court.

This subsection shall not be construed or applied to deny the right of a respondent to bring any civil action against one who has filed a complaint under this subtitle.

Art. 64A, § 33 ANNOTATED CODE OF MARYLAND

§ 33. Separation of employees.

An employee may be permanently separated from the classified service through resignation, rejection on probation or removal, and may be temporarily separated through layoff, suspension or leave of absence.

The Secretary of Personnel shall by rule prescribe what shall constitute resignation.

The appointing authority may at any time before the expiration of the probation period reject any person appointed to a position in his department upon statement

in writing to the Secretary of Personnel of the cause for rejection; the probation period shall be for a period not exceeding 90 days, except for positions higher than the pay scale numbered 7 on January 1, 1967, in which positions the probation period shall be for a period not exceeding six months, unless the appointing authority shall suggest and the Secretary shall approve a longer period, which shall in no event under any circumstances, including changes of job classifications, exceed six months, except for positions higher than the pay scale numbered 12 on January 1, 1967, in which positions the period of probation shall not exceed one year, provided that no appointing authority shall have power to remove a probationer who has been appointed by promotion from another class without the consent of the Secretary. The employee so rejected shall be considered permanently separated from such position, but the Secretary may keep the name of the person thus rejected on the eligible list from which he was appointed for future certification to another position in the class to which the list applies.

No employee who has completed his probation may be permanently removed from the classified service except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges may be filed by the appointing authority or by any citizen, provided, however, that no such charges may be filed by a citizen, without the consent of the appointing authority or of the Secretary, and such charge shall within ninety days after filing, be heard, investigated and determined by the Secretary or by some person or board appointed by the Secretary to hear, investigate and determine the same. The Secretary of Personnel shall render this decision within 45 days after a hearing is held before him or his authorized representative or within 45 days after all legal memoranda or briefs have been filed.

The finding and decision of the Secretary or of such person or board when approved by the Secretary shall be final, and shall be certified to the appointing authority and shall be forthwith enforced by such authority.

The Secretary shall, by rule, prescribe what may constitute cause for removal, but no removal shall be allowed because of the religious or political opinions or affiliations of any employee. The provisions of this section shall apply to the demotion of an employee as described in §31 of this article.

Art. 64A, §52

STATE EMPLOYEE GRIEVANCE PROCEDURES

§52. Definitions.

(a) As used in this subtitle, the following words have the meanings indicated.

(b) *"Grievance"* means any cause of complaint unless otherwise provided for under this article arising between an employee and his employer over the interpretation and application of State employee personnel rules, regulations, policies or any other rules, regulations or policies over which management has control.

(c) *"Work day"* means any day from Monday through Friday. (1977, ch. 727.)

§53. Employees authorized to present grievances; representation; exceptions.

(a) Any employee classified or unclassified, of the executive branch of the State government, unless excepted by subsection (c) of this section, may present any grievance which he may have, in accordance with the provision of this subtitle, free from interference, coercion, restraint, discrimination or reprisal.

(b) Any employee authorized to present a grievance may be represented at any stage of the grievance procedure by any person or persons of his choice.

(c) The following persons are excepted from the provisions of this subtitle:

(1) Persons appointed by the Governor or whose appointment requires gubernatorial approval;

(2) Deputy Attorneys General and assistant Attorneys General, and all attorneys on the staff of the Attorney General including counsel to the principal departments of the executive branch of the State government;

(3) The chief deputy comptroller, and the chief deputy treasurer;

(4) Persons who are subject to collective bargaining agreements containing other grievance procedures;

(5) Persons who are subject to contracts, rules or regulations concerning teacher tenure, including employees on a faculty staff;

(6) Student employees;

(7) Patients and inmates in State institutions;

Art. 64A, §54 ANNOTATED CODE OF MARYLAND

STATE EMPLOYEE GRIEVANCE PROCEDURES

§54. Steps in procedure; back pay.

(a) *Steps outlined.* — There shall be five steps in this procedure.

(1) *Step one.* Step one shall be the initiation of a complaint. Grievances must be initiated within 30 days of the alleged complaint or within 30 days after the complaining employee reasonably may be held to have knowledge of the act of which he is complaining. An aggrieved employee and his designated representative may either:

(i) Present his grievance orally to his immediate supervisor for the purpose of informal discussions. If the grievance is unresolved after three days, the employee may appeal to stet two, which appeal must be in writing and filed within three days; or

(ii) Present his grievance in writing to his intermediate supervisor for formal consideration. If the grievance is presented to the intermediate supervisor, the intermediate supervisor shall within five days after receipt of the written grievance hold a conference with the aggrieved and or his designated representative and shall within five days after the conclusion of the conference render his decision in writing to the aggrieved and or his designated representative. In the event the aggrieved employee is not satisfied with the decision rendered at this step, he and or his designated representative may appeal in writing to step two within five days.

(2) *Step two.* The grievance appeal shall be presented, in writing, to the program director or his designated representative. Within five days after receipt of the written grievance, the program director or his designated representative shall hold a conference with the aggrieved and or his designated representative and shall render a written decision within ten days after the conclusion of the conference. In the event an aggrieved is not satisfied with the decision, he and/or his designated representative may appeal in writing to the next step within five days.

(3) *Step three.* The grievance appeal shall be presented, in writing, to the appointing authority, or his designated representative. Within ten days after the receipt of the written grievance appeal the appointing authority or his designated representative shall hold a conference with the aggrieved and/or his designated representative and shall render a written decision to the aggrieved within 15 days after the conclusion of the conference. In the event the aggrieved employee is not satisfied with the decision, he and/or his designated representative may appeal, in writing, to the next step within ten days.

(4) *Step four.* The grievance appeal shall be presented in writing to the Secretary of the Department or his designated representative. Within ten days after the receipt of the written grievance appeal the Secretary or his designated representative, shall hold a conference with

the aggrieved and/or his designated representative and shall render a written decision to the aggrieved within 15 days after the conclusion of the conference.

(5) *Step five.* If the dispute is still unresolved, the grieving employee shall have the right to submit said dispute to either arbitration or to the Secretary of Personnel. In either case the appeal must be submitted within 15 days after the receipt of the written decision at step four. If the grieving employee chooses to have his grievance heard by the Secretary of Personnel, the Secretary shall render his written decision within 45 days after the hearing is held by him or his authorized representative or within 45 days after all legal memoranda or briefs have been filed in the grievance hearing. In the event of arbitration, the parties shall select an arbitrator by mutual agreement. If they are unable to reach a mutual agreement, an arbitrator shall be supplied by the American Arbitration Association in accordance with its procedures. Any fees resulting from arbitration shall be assessed by the arbitrator equally between the two parties. The decision of the arbitrator shall be advisory to the Secretary of Personnel and no additional appeals or hearings may be considered. The Secretary of Personnel shall make the final decision which shall be binding on all parties. The written decision of the Secretary shall be rendered within 15 days after the receipt of the decision of the arbitrator.

(b) *Back pay based on grievances.* — The Secretary of Personnel shall have the power to order an appointing authority to grant back pay in any grievance and an appointing authority shall enforce any such order.

(c) *Back pay based on misclassification.* — In any reclassification case in which the Secretary of Personnel or his authorized representative determines that an employee is entitled to back pay because the employee has been misclassified or has been working out of classification, the Secretary may, in his discretion, award back pay to the employee for a period not to exceed one year prior to the initial filing of the grievance.

Human Relations Commission — State Employees

FOR the purpose of eliminating the necessity that State employees file a grievance, where one is available, in order to give notice of an employment discrimination complaint filed with the Human Relations Commission.

BY repealing and reenacting, with amendments,

Article 49B — Human Relations Commission
Section 7(b)
Annotated Code of Maryland
(1979 Replacement Volume and 1982 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article 49B — Human Relations Commission

7.

(b) (1) In any employment discrimination case in which an agency, officer or employee of the State of Maryland is a respondent, the rules, procedures, powers, rights, and remedies which are applicable in such a case shall be those which are applicable in a discrimination case in which a private person is the respondent[; provided that a State employee making a complaint to the commission concerning his State employment must first give notice by filing a grievance proceeding, if one is available to him].

(2) In discrimination cases in which an agency, officer or employee is a respondent, the power of the Human Relations Commission includes the authority to seek injunctive relief or judicial enforcement of its orders against such respondents.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1983.

Approved May 24, 1983.

CODE OF MARYLAND REGULATIONS

06.01.01.60

.60 Appeal of Termination of Employment of An Unclassified Employee.

A. Notwithstanding the provisions of Regulation .01, an unclassified employee, except for unclassified and faculty employees of educational institutions, unless otherwise provided by law, whose employment is terminated according to Regulation .62 may submit a written appeal to the Secretary within 5 working days after receipt of the notice of termination.The appeal is limited to the legal and constitutional bases for the termination.

B. The Secretary or his designated representative shall hear the appeal within 30 calendar days after receipt of the written appeal. The Secretary shall render his written decision within 30 calendar days after the hearing. If the employee does not appeal the termination within the 5-day period set forth in § A, or if the employee does not appear at the scheduled hearing, the Secretary shall uphold the termination.

MARYLAND RULES OF PROCEDURE

Rule B4. Time for Filing.

a. *Within Thirty Days.*

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent, or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date of the receipt of such notice.

APPENDIX B

OPINIONS AND ORDERS

United States Court of Appeals
For The Fourth Circuit

No. 82-1924

James R. Grattan and Adrienne S. Hedman,
Appellants,

v.

Calvin W. Burnett, Individually and in his official capacity as President, Coppin State College; J. Carson Dowell, Individually; Board of Trustees of the State Universities and Colleges of Maryland; Edmund C. Mester, Individually; Ronald K. DeSouza, Individually and in his official capacity as Vice-President of Student Affairs, Coppin State College and Harry Hughes, Governor of Maryland,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge.

Argued March 10, 1983 *Decided June 22, 1983*

Before WINTER, Chief Judge, ERVIN, Circuit Judge, and ALDRICH,* Senior Circuit Judge.

*** Honorable Bailey Aldrich, Senior United States Circuit Judge for the First Circuit, sitting by designation.**

Sheldon H. Laskin (Glen M. Fallin on brief) for Appellants; Diana G. Motz, Robert A. Zarnoch (Christine Steiner, Michael A. Anselmi, Assistant Attorneys General; Stephen H. Sachs, Attorney General of Maryland on brief) for Appellees.

WINTER, Chief Judge:

James Grattan and Adrienne Hedman appeal from an order of the district court dismissing their complaints of race and sex discrimination brought under 42 U.S.C. §§ 1981, 1983, 1985 and 1986, and Article 23 of the Maryland Declaration of Rights. The suit was brought against the president of Coppin State College, a public institution of higher education operated by the State of Maryland, the vice-president of student affairs and the chairman and executive director of the board of trustees governing Coppin and other state universities and colleges. The district court held plaintiffs' claims time-barred since they were not brought within the six-month limitations period prescribed by Md. Ann. Code, Article 49B, § 9(a). We reverse. We conclude that the appropriate limitations period for such claims is three years, as prescribed by Md. Ann. Code, Courts and Judicial Proceedings, § 5-101. We conclude further that the claims may be deemed to have been brought within this period, even though they were not explicitly made by amended complaint until five years after the alleged discrimination, since the amended complaint relates back to an earlier and timely complaint.

I.

In the summer of 1976, James R. Grattan and Adrienne S. Hedman were dismissed from their positions as Director of Minority Relations and Minority Relations Counselor, respectively, at Coppin State College. They allege that they were dismissed and discriminated against while at Coppin State College because of their race, and in retaliation for their vocal support of white students there. Plaintiffs allege that they are both white, and, while it is not specifically alleged, the parties concede that Coppin

State College was a formerly all-black educational institution and is today still a predominantly black school. Hedman also alleges that she was discriminated against because of her sex.

Plaintiffs filed two claims of race and sex discrimination with the Equal Employment Opportunity Commission (EEOC) immediately upon learning of their pending termination in June 1976. While those claims were pending, they filed this suit in state court on February 17, 1977. They alleged that their dismissals were arbitrary, capricious, without basis in fact or law, illegal and invalid under the Maryland and Federal constitutions. However, their complaint contained no specific allegations of race or sex discrimination. Those claims, together with an allegation of violation of their right to free speech, were added on October 13, 1981, by the filing of an amended complaint. Defendants removed the state court action to the district court on November 12, 1981. At the time, there was pending in the district court two separate actions filed by Grattan and Hedman inn 1981 against the same defendants claiming unlawful employment discrimination under Title VII.

On motion of the defendants, the district court dismissed the removed action. However, it denied a motion to dismiss the complaints grounded on Title VII as being outside the scope of plaintiffs' EEOC charges. These actions are still pending. The district court ruled that plaintiffs' race and sex discrimination claims brought under 42. U.S.C. §§1981, 1983 and 1985 were barred since they were not brought within the six-month period of limitations provided in Md. Ann. Code, Article 49B, §9(a). Plaintiffs' §1986 action (failure to redress wrongs proscribed by §1985 by one who has knowledge and power to act) was also dismissed, even though it was brought within the one-year limitations period provided by that section, on the ground that it was derivative of the barred §1985 action. The district court ruled further that plaintiffs' free speech claim was governed by a three-year limitations period, but held it barred as well since it was

not raised until 1981 and did not relate back to the 1977 complaint. Finally, it dismissed their claim under the Maryland Constitution holding that it was doubtful that there was an implied cause of action for damages under Maryland law and, in the alternative, that the claim was barred under the six-month limitations period applicable to the analogous federal right.

Before us, neither party contests the propriety of the district court's disposition of the Title VII and free speech claims. The issues raised concern only the dismissal of plaintiffs' claims of race and sex discrimination brought under 42 U.S.C. §§1981, 1983, 1985 and 1986, and the Maryland Constitution.

II.

Sections 1981, 1983 and 1985 of Title 42 specify no limitations period for actions brought thereunder. We therefore look to Maryland law to borrow the limitations period for the most analogous state action. Recently, we rejected the argument that the appropriate limitations period for employment discrimination actions in Maryland is the six-month period prescribed in Md. Ann. Code, Article 49B, §9(a). That statute empowers the State Human Relations Commission to investigate and prosecute claims of employment discrimination, and requires that claims be filed within six months of the date of the occurrence. We held that the proper period in Maryland for actions under Title 42 is three years as provided by Md. Ann. Code, Courts and Judicial Proceedings, §5-501. That statute provides a general limitations period of three years for actions for which no other period is specifically provided. McNutt v. Duke Precision Dental and Orthodontic Laboratories, 698 F.2d 676 (4 Cir. 1983).

Despite *McNutt*, defendants urge upon us an even shorter limitations period — five and one-half months — derived from a variety of provisions in Md. Ann. Code, Article 64A, §33, regulations adopted thereunder, related statutes, and Rules of the Maryland Court of Appeals.

Article 64A establishes a merit system and employment protection for certain state employees and, by a combination of provisions, gives a discharged employee a total of five and one-half months to sue in a state court to redress an improper discharge. Of course, the effect of Article 64A was not considered in *McNutt* since the plaintiff there was a non-public employee, but we think that the reasoning of *McNutt* is equally applicable to public employees.

In *McNutt* we rejected the six-month limitations period of Article 49B, §9(a), because it governed the limitation of administrative proceedings which were informal, investigatory and conciliatory in nature. We reasoned that while such a short period might suffice to present an informal complaint which could then be fleshed out by the Commission, it was an inadequate time in which to prepare a formal complaint suitable for adversary proceedings in federal court, and that for this reason it was unlikely the Maryland legislature intended that this limitations period apply to civil actions. 698 F.2d at 678-679. We think it even less likely that the Maryland legislature intended that the limitations period defendants derive from Article 64A and related sources be applied to civil actions for discrimination. That period is even shorter than the period considered in *McNutt*. A proceeding under Article 64A is an administrative proceeding and the largest part of it — 130 of the total of 165 days — is spent formally adjudicating a claim initiated by the state. That the Maryland legislature thought this adequate time to resolve a termination dispute in which the state must frame the issues and bear the burden of proof hardly evidences an intent to impose a similar limit on the time in which an employee who is discharged may employ counsel who will investigate the termination and prepare a complaint. Indeed, under Maryland law a disgruntled employee, after proceedings under Article 64A are concluded, may turn to the State Human Relations Commission for relief from discrimination. Md. Ann. Code. Article 49B, §7(b)(1). This, too, indicates that the Mary-

land legislature did not intend that the passing of a 165-day period should bar an employee from seeking administrative or judicial relief for discriminatory termination. Thus, we conclude that, in Maryland, three years is the limitations period for discrimination suits brought under the Civil Rights Acts by employees in public as well as private employment.

III.

Next, we must determine whether the claims of race and sex discrimination first explicitly raised by Grattan and Hedman in their 1981 amended complaint relate back to the 1977 complaint, and so come within the three-year limitations period. Rule 15(c), F. R. Civ. P., states: "(w)henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." In applying Rule 15(c) in the past, we have focused upon two issues in determining whether an amended claim relates back to an earlier complaint. First, to relate back there must be a factual nexus between the amendment and the original complaint. *See, e.g.*, Griggs v. Farmer, 430 F.2d 638 (4th Cir. 1970), *aff'g per curiam* 314 F. Supp. 1185 (E.D. Va. 1969); Wall v. Chesapeake & O. Ry., 339 F.2d 434 (4th Cir. 1964). Second, if there is some factual nexus an amended claim is liberally construed to relate back to the original complaint if the defendant had notice of the claim and will not be prejudiced by the amendment. Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir.), *cert. dis.*, 448 U.S. 911 (1980).

There is a factual nexus between the discrimination claims which Grattan and Hedman added by amendment in 1981 and their complaint of arbitrary dismissal made in 1977. Both concern the events leading up to their termination at Coppin State College, and in both the termination was the ultimate wrong of which they complained.

It appears also that defendants had notice of the claims and will not be prejudiced by the amendment. Defendants

are the top administrators of Coppin State College. When Grattan and Hedman complained of race and sex discrimination in complaints filed with the EEOC in June 1976, defendants were bound to have known of them. Forewarned, they should have realized that, as this suit progressed, a discrimination theory might evolve. Moreover, because of the EEOC proceedings, it is more likely than not that they have preserved any evidence relevant to those claims. Thus, they should not be prejudiced by the amendment. Plainly, the Title VII proceedings should have put defendants on notice of the possibility that Grattan and Hedman might bring claims under the Civil Rights Act. *Cf.* Sessions, v. Rusk State Hospital, 648 F.2d 1066 (5th Cir. 1981); Gridley v. Cunningham, 550 F.2d 551 (8th Cir. 1977); Goss v. Revlon, Inc., 548 F.2d 405 (2nd Cir. 1976) *cert. den.*, 434 U.S. 968 (1977) (claims invoking Title VII and the Civil Rights Acts relate back to each other). For these reasons we conclude that the 1981 amendment did relate back and the claims asserted therein are not time-barred. The case must therefore be returned to the district court for further proceedings.*

REVERSED AND REMANDED.

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* We refrain from expressing any view on the question of whether plaintiffs have a private right of action under Article 23 of the Maryland Declaration of Rights. In the event that plaintiffs do not prevail on their federal rights of action and the district court concludes to exercise pendent jurisdiction, we think that the district court should certify this question to the Maryland Court of Appeals under Ann. Md. Code, Courts and Judicial Proceedings, § 12-601.

In The United States District Court
For The District Of Maryland

Memorandum and Order
Civil Action No. R-81-2407
(dated September 17, 1982)
Adrienne S. Hedman, Plaintiff

v.

Coppin State College; Board of Trustees of the State Universities and Colleges Of Maryland; And State Of Maryland, Defendants.

Civil Action No. R-81-2914

James R. Grattan and Adrienne S. Hedman, Plaintiffs

v.

Calvin W. Burnett, individually and in his official capacity as President, Coppin State College; J. Carson Dowell, individually; Board of Trustees of the State Universities And Colleges of Maryland; Edmund C. Mester, individually; Ronald K. DeSouza, individually and in his official capacity as Vice-President of Student Affairs, Coppin State College; and
Harry Hughes, Governor of Maryland, Defendants

Civil Action No. R-81-3176

James R. Grattan, Plaintiff

v.

Coppin State College and Board of Trustees of the State Universities and Colleges of Maryland and State of Maryland, Defendants

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These related cases involving claims of employment discrimination are currently before the Court on defendants' motions to dismiss. The motions have been fully briefed and counsel heard on the record. At the hearing, counsel indicated to the Court that certain agreements had been entered into which would clarify

several of the issues in the motions. In a letter dated May 19, 1982, from counsel for defendants the agreements of counsel were outlined for the Court.

In *Hedman v. Coppin State College,* R-81-2407, and *Grattan v. Coppin State College,* R-81-3176, plaintiffs Adrienne S. Hedman ("Hedman") and James R. Grattan ("Grattan"), respectively, have asserted causes of action for alleged employment discrimination in violation of Title VII 42 U.S.C. §2000e *et seq.* In *Grattan v. Burnett,* R-81-2914, Grattan and Hedman are joined as co-plaintiffs in a suit against various college officials alleging causes of action pursuant to 42 U.S.C. §§1981, 1983, 1985, and 1986; the First and Fourteenth Amendments; and Articles 19, 23, and 46 of the Maryland Constitution. Since the Title VII cases, R-81-2407 and R-81-3176, raise common issus, they will be addressed together and independently of R-81-2914.

I. *The Motions To Dismiss Plaintiffs' Title VII Claims*

On September 22, 1981, Hedman, a former unclassified administrative employee at Coppin State College ("Coppin"), filed Civil Action No. R-81-2407 against Coppin, the Board of Trustees of the State Universities and Colleges of Maryland ("the Board") and the State of Maryland ("the State"). In her complaint, she alleges race and sex discrimination in a broad variety of areas including pay increases, job assignments and the non-renewal of her employment contract for the academic year 1976-77. Hedman seeks back pay, compensatory damages, reinstatement to her former position, and costs and attorneys fees, pursuant to Title VII.

On December 10, 1981, Grattan, a former unclassified administrative employee at Coppin filed Civil Action No. R-81-3176 against Coppin, the Board, and the State. In his complaint Grattan alleges race and sex discrimination in a broad variety of areas including compensation, terms, conditions, and privileges of employment. Like Hedman, Grattan seeks back pay, compensatory damages, reinstatement, and costs and attorney's fees.

Defendants moved to dismiss the Board and State arguing that they had not been named by either Hedman or Grattan in their respective charges to the EEOC. Subsequent to the filing of the motions, counsel for plaintiffs and defendants stipulated that the Board and the State should be dismissed, with the further stipulation that Coppin State College is an agency of the State of Maryland. Defendants' motion to dismiss the Board and the State in R-81-2407 and R-81-3176, therefore, will be granted and plaintiffs' Title VII suits will proceed against Coppin only.

Defendants have also moved to dismiss all allegations in Grattan's and Hedman's complaints which were not made in their charges to the EEOC. In Hedman's charge to the EEOc she claimed that her race (white) was the reason that her contract was not renewed for the 1976-77 year and that because of her sex (female) she had been paid at a lower rate than male employees performing the same duties with less seniority and fewer qualifications. In the complaint in this case, Hedman alleges race and sex discrimination not only in connection with pay and termination, but also in connection with (1) adverse treatment by supervisors, (2) unjustified transfers within the College, (3) discriminatory work assignments, (4) reassignment with the College, (5) payroll difficulties, and (6) difficulties in securing contracts.

In Grattan's charge to the EEOC, he claimed that because he was white, he was terminated whereas black employees who had been unable to perform their duties properly had not been discharged. In the complaint in this case Grattan alleges race and sex discrimination and discrimination pertaining to terms and conditions of employment such as denial of (1) conference attendance, (2) long distance telephone privileges, (3) administrative and logistical support, and (4) the cancellation of an athletic event.

It is well settled that "the scope of a Title VII suit is limited to the claims asserted in the administrative charge

of discrimination and such other claims uncovered during a reasonable administrative investigation of that charge, provided that those other claims were actually investigated by the administrative agency." *Mobley v. Acme Markets, Inc.*, 473 F. Supp. 851, 853 (D. Md. 1979). This requirement promotes the statutory preference for agency conciliation prior to a civil suit. To permit new claims would by-pass the conciliation procedures and frustrate the role of the EEOC in the statutory scheme. *Hubbard v. Rubber Maid, Inc.*, 436 F. Supp. 1184 (D. Md. 1977).

In response to the motions to dismiss, both Hedman and Grattan have amended their complaints to allege that all of the allegations contained therein were made to the EEOC and investigated by the EEOC. In addition, Hedman has provided the Court with a copy of her affidavit to the EEOC wherein she stated in detail not only her termination and equal pay claims, but also those claims in her complaint dealing with work assignments, transfer, and treatment. Viewing, as it must on a motion to dismiss, the well pleaded material allegations of the complaint in the light most favorable to plaintiffs, the Court must assume at this stage of these proceedings that Grattan's and Hedman's claims of discrimination were made to and/or investigated by the EEOC. Defendants' argument that plaintiffs have failed to substantiate their allegations that these claims *were actually investigatged* by the EEOC is misplaced on a motion to dismiss. The motions to dismiss portions of Hedman's and Grattan's claims as being outside the scope of their charges to and the investigations by the EEOC will be denied.[1]

Defendants have moved to dismiss any claims of alleged employment discrimination which occurred prior to 180 days before plaintiffs filed their charges of discrimination

[1] Grattan has noted, however, that any reference in his complaint to sex discrimination was inadvertent and is not part of his cause of action. Therefore, defendants' motion to dismiss Grattan's claims of discrimination on the basis of gender as being outside the scope of his charge to the EEOC will be granted.

with the EEOC. Since Hedman filed her charge with the EEOC on June 23, 1976, defendants argue that any cause of action relating to allegations of employment discrimination prior to December 26, 1975, should be dismissed as time barred. Grattan filed his charge with the EEOC on June 22, 1976, and defendants similarly argue that December 25, 1975, is the temporal time limit for defining his cause of action. In response to defendants' argument for a 180-day limitation, plaintiffs have raised three bases for a longer limitations period in their respective cases.

First, Hedman and Grattan each argue that their complaints allege a continuing pattern and practice of discrimination which tolls the running of the statute of limitations. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e) establishes the time limitations for filing a charge of discrimination with the EEOC. These limitations for filing an EEOC charge are flexible, however, where a continuing violation of Title VII is present. *See Patterson v. American Tobacco Co.*, 586 F.2d 300, 304-05 (4th Cir. 1978), *after remand*, 634 F.2d 744, 751 (4th Cir. 1980), *vacated*, 71 L. Ed. 2d 748 (1982). Recently the Supreme Court has restricted the scope of the continuing violation doctrine. In *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 588 (1977), the Supreme Court expressly rejected a claim of continuing discrimination even though it was conceded that the plaintiff was suffering from present effects of past discrimination, holding that the emphasis should not be placed on mere continuity, but instead on whether any present violation exists. Similarly, in *Day v. Patapsco & Back Rivers Railroad Co.*, 504 F. Supp. 1301, 1304 (D. Md. 1981), the Honorable Joseph H. Young of this Court noted that "to construe too loosely 'continuing discrimination' would undermine the theory underlying the statute of limitations."

The typical illustration of a continuing violation is the payment of a discriminatory wage. *See, e.g., Kim v. Coppin State College*, 662 F.2d 1055, 1061 (4th Cir. 1981); *Corbin v. Pan American World Airways, Inc.*, 432 F. Supp. 939 (N.D. Cal. 1977). The payment of a discriminatory wage is

repeated each time the plaintiff receives a pay check. *Mobley v. Acme Markets, Inc., supra,* 473 F. Supp. at 858. "In contrast, demotions, layoffs, and discharges, are discrete acts not subject to repetition and are normally not considered to be continuing violations." *Id.* (citations omitted).

Hedman's principal claims are that she was discriminatorily terminated and paid an unequal wage. Grattan's primary claim is that he was discriminatorily terminated. Under any limitations, Hedman's and Grattan's termination claims are timely, each having filed a charge of discrimination with the EEOC well within 180 days of their termination. Further, as noted above, Hedman's equal pay claim is also timely as it clearly constitutes a continuing violation claim. Both plaintiffs, however, attempt in their complaints to reach back and make actionable all those incidents leading up to their terminations which they regard now as examples of unequal treatment. Hedman, for example, seeks to recover for alleged adverse treatment by a supervisor in 1972, subsequent reassignment within the college, payroll difficulties in 1973, and treatment by supervisors in 1975. Similarly, Grattan asserts as continuing violations the alleged denial of long distance telephone privileges, the denial of conference attendance, and cancellation of an athletic event. Counsel for plaintiffs concedes that the incidents recited above are facially discrete. He argues, however, that since these incidents are joined by racial animus, as illustrated by incidents of hostility, they support findings of continuing violations.

The Court finds that, with the exception of Hedman's claim for unequal pay, plaintiffs have not alleged claims which can be characterized as continuing violations. The allegedly discriminatory acts asserted in the complaints, such as termination, cancellation of a sporting event, work assignments, etc., are discrete and isolated acts and did not constitute *present violations* at the time charges were filed by plaintiffs with the EEOC. Acceptance of counsel

for plaintiffs' theory for finding a continuing violation in this case would mean that any time a plaintiff alleges discrimination on the basis of race, there would be a continuing violation and he, in some cases, could file his charge with the EEOC at any time without regard to the statutorily established period of limitations. It was precisely this type of analysis against which Judge Young warned in *Day v. Patapsco & Back Rivers Railroad Co., supra.*

As a practical matter, the Court notes that plaintiffs' cases are not prejudiced by the application of the statutory limitations period. As noted, their primary claims of termination and unequal pay are timely filed and are actionable. Since there can be only recovery if liability is established, it seems to matter little if, for example, Grattan had an independent cause of action for being denied attendance at a conference or long distance telephone privileges, and Hedman, for example, had an independent cause of action for discriminatory work assignments in 1972. As the Supreme Court noted in *United Air Lines, Inc. v. Evans, supra,* all these prior acts "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." 431 U.S. at 558. Evidence about these prior acts will be admissible at trial and, when viewed together, may paint two pictures of discriminatory treatment which in each case ultimately resulted in termination. Thus, although the incidents occurring before the limitation period in each case are not independently actionable, they are relevant to the viable causes of action in these cases.

In addition to arguing that their claims are continuing in nature thereby tolling limitations, Hedman and Grattan both argue that limitations should be tolled in their cases since the running of the period for filing an administrative charge is subject to equitable tolling. Plaintiffs' rely on the Supreme Court's recent decision in *Zipes v. Trans World Airlines, Inc.,* 71 L. Ed. 2d 234 (1982), wherein the Court held that filing a timely charge

of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. Although plaintiffs' have accurately stated the law, they have not suggested any reason why limitations should be tolled on equitable grounds in their respective cases. There is no element of waiver in these cases since defendants have expressly raised limitations as a defense in their answers and motions to dismiss. Similarly, Hedman and Grattan have not claimed that defendants should be equitably estopped from raising limitations. *See Citicorp Person-to-Person Financial Corp. v. Brazell,* 658 F.2d 232, 234-35 (4th Cir. 1981). Their argument that by characterizing their claims as continuing violations they are entitled to the benefit of equitable tolling as outlined in *Zipes,* is based on an overly broad interpretation of that case.

Finally, plaintiffs argue that if a limitations period is to be applied in their cases, 300 days, rather than 180 days is the applicable period. Under Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), the EEOC charge is to be filed within 180 days of the alleged discriminatory act. If the charge must be filed with the state fair employment practices agency under 42 U.S.C § 2000e-5(c), the time for filing an EEOC charge is extended to 300 days. *Mohasco Corp. v. Silver,* 447 U.S. 807, 810 (1980). The State of Maryland has established a deferral agency — the Maryland Commission on Human Relations (MCHR) — with authority to provide relief from unlawful employment practices. Article 49B, § 9(a) of the Annotated Code of Maryland provides that to be timely, a charge must be filed with the MCHR within six months of the alleged discriminatory conduct. Neither Hedman nor Grattan claim to have filed charges with the MCHR within six months of the alleged discriminatory conduct. Charges of discrimination, however, in both cases were filed with the EEOC within 180 days of their terminations.[2]

[2] Defendants do not contest the timeliness of Hedman's termination and equal pay claims and Grattan's termination

In *Mobley v. Acme Markets, Inc., supra,* 473 F. Supp. at 857, the U.S. District Court for this District, relying on the Court of Appeals for the Fourth Circuit's decision in *Doski v. M. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976), held that to trigger the longer, 300-day time limit for filing charges with the EEOC, state charges must be timely filed under state law. *Accord, Battle v. Clark Equipment, Brown Trailer Division,* 524 F. Supp. 683, 686 (N.D. Ind. 1981) (and the numerous cases cited therein).[3] The Supreme Court's subsequent decision in *Mohasco Corp. v. Silver, supra,* does not require a different result. In *Mohasco,* the Supreme Court noted that a claimant in a deferral state was not required to file a charge of discrimination with the state's deferral agency within 180 days to benefit from the 300-day period for filing a charge with the EEOC. In that case, however, the plaintiff filed timely charges with the New York deferral agency under that state's one year limitations period. Thus, *Mohasco* did not disturb the principal first stated in this district in *Mobley* that plaintiffs who fail to file timely charges with deferral state agencies cannot take advantages of Section 706(e)'s 300-day limitation.

Similarly, the Supreme Court's decision in *Oscar Mayer & Co v. Evans,* 441 U.S. 750 (1979), construing the Age Discrimination Employment Act (ADEA), also relied on by plaintiffs, does not require a contrary result. Although *Oscar Mayer* arguably lays the ground work for the result plaintiffs seek, the case does not address the issue of whether a charging party under Title VII or statutes modeled on Title VII must file a timely claim with the

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claim, the principal claims made in these lawsuits. As counsel for plaintiffs noted at the hearing, it is not critical in these cases whether 180 days or 300 days is the appropriate limitations, since plaintiffs' claims, in large part, are either well within 180 days of their filings or well beyond 300 days of their filings with the EEOC.

[3] For an outline of the division on this issue which has existed among the lower federal courts, see *Baruah v. Young,* 536 F. Supp. 356, 361-62 (D. Md. 1982).

State deferral agency to benefit from a longer limitations period for filing a charge with the federal agency. In view of the subsequent opinions from this district, *e.g., Mobley v. Acme Markets, Inc., supra,* Fourth Circuit decisions, *see Citicorp Person-to-Person Financial Corp. v. Brazell, supra,* (although Title VII and the ADEA are to be construed similarly, the filing requirements of each are not identical), and the absence of a definitive statement from the Supreme Court, the Court finds that the current law in this Circuit requires a plaintiff to file a timely charge with the state deferral agency to be entitled to a 300-day time limit for filing with the EEOC. The Court concludes, therefore, that it will consider as actionable only those acts or omissions occurring within the 180-day period before plaintiffs charges were filed with the EEOC. As to Hedman, relief pursuant to Title VII for any alleged unlawful acts occurring prior to December 26, 1975, is time barred and similar relief for Grattan is time barred for alleged unlawful acts occurring prior to December 25, 1975.

Defendants have also moved to strike Hedman's and Grattan's claims for compensatory damages under Title VII. In response to the motions, Hedman and Grattan have abandoned their claims for compensatory damages in their Title VII suits. Therefore, defendants' motions to strike Hedman's claim for compensatory damages in R-81-2407 and Grattan's claim for compensatory damages in R-81-3176, will be granted.

II. *The Motion To Dismiss Plaintiffs' Claims Arising Under The Civil Rights Act And The United States And Maryland Constitutions*

On February 17, 1977, Hedman and Grattan filed what is now known as R-81-2914, in the Circuit Court No. 2 of Baltimore City, against Calvin W. Burnett ("Burnett"), President of Coppin; J. Carson Dowell ("Dowell"), then the Chairman of the Board; Edmund C. Mester ("Mester"), then the Executive Director of the Board; Ronald K. DeSouza ("DeSouza"), Vice President for Student Affairs

at Coppin; and Marvin Mandel, then Governor of Maryland. The suit was premised on the Maryland Uniform Declaratory Judgment Act and sought a declaration that the non-renewal of plaintiffs' employment contracts in the summer of 1976 had been arbitrary, capricious, without basis in fact or law, illegal, and invalid under the Constitutions of the United States and the State of Maryland.

In March, 1977, defendants demurred to the Bill of Complaint on the grounds of sovereign immunity and in December, 1978, they filed a supplemental demurrer on the ground that the facts set forth in the complaint did not state a case appropriate for declaratory relief. On September 9, 1981, a hearing on defendants' demurrers was held before Judge Joseph H. Kaplan of the Supreme Bench of Baltimore City and, without consideration of the original demurrer, defendants' supplemental demurrer was granted with leave to amend on September 10, 1981. On October 13, 1981, plaintiffs filed an amended and supplemental bill of complaint. The amended complaint altered the jurisdictional basis for and legal theories underlying the action. In Count I of the amended complaint, Hedman and Grattan assert a cause of action under 42 U.S.C. §§1981, 1983, 1985 and 1986, the Fourteenth Amendment, and Article 23 of the Declaration of Rights of the Constitution of Maryland, alleging that they were dismissed from their employment on the basis of race. In Count II, Hedman alleges a cause of action for employment discrimination based on sex under 42 U.S.C. §1983, the Fourteenth Amendment, and Articles 23 and 46 of the Maryland Constitution. Claims for violations of the right to free speech are asserted by Grattan and Hedman in Counts III and IV respectively under the First and Fourteenth Amendments of the United States Constitution, Article 19 of the Maryland Constitution and 42 U.S.C. §1983. Count V of the amended complaint is a claim by Grattan for relief from alleged employment discrimination under Title VII, 42 U.S.C. §2000e *et seq.*

In response to the amended complaint, defendants, noting that the allegations sounded in law rather than in equity, filed a motion to transfer the action to the Superior Court for Baltimore City, pursuant to Rule 515 of the Maryland Rules of Procedure. This transfer was effected on November 5, 1981, and, on November 12, 1981, defendants filed a petition removing the action to this Court. The motion to dismiss currently before the Court was subsequently filed.

Defendants have moved to dismiss plaintiffs' claims of employment discrimination in Counts I and II of the amended complaint as untimely filed. Sections 1981, 1983 and 1985 contain no facial limitations provisions.[4] The relevant statute of limitations for federally created causes of action which do not provide their own filing periods is the state statute or remedy "most analogous" to the federal action. *Burns v. Sullivan*, 619 F.2d 99, 105 (1st Cir.), *cert. denied*, 499 U.S. 893 (1980); *see Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *McCausland v. Mason County Board of Education*, 649 F.2d 278, 279 (4th Cir.), *cert. denied*, 70 L. Ed. 2d 639 (1981). The Court of Appeals for the Fourth Circuit has established a more comprehensive standard for determining which state statute of limitations should be applied to an action brought under a federal law that has none:

> When borrowing a state statute of limitations for federal purposes, a court should look to the statute which most clearly addresses the same or similar policy considerations as are addressed by the federal right being asserted. It is not necessary that a state statute operate in the same fashion as the federal scheme, nor is it necessary that the state

[4] Plaintiffs' claims under 42 U.S.C. § 1983 and 1985 are based on an alleged denial of equal protection guaranteed by the Fourteenth Amendment. Plaintiffs' state in their memoranda that they are not pursuing claims under the due process clause of the Fourteenth Amendment, despite language in the original complaint to the contrary.

> statute describe a cause of action identical to the federal cause at issue. There simply must be a commonality of purpose between the federal right and the state statutory scheme so that it is reasonable to subject the federal implied right to the statute of limitations provided by state law.

O'Hara v. Kovens, 625 F.2d 15, 18 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) (citations omitted).

In *McGill v. General Electric Co.*, 524 F. Supp. 1126 (D. Md. 1981), *appeal docketed*, the Honorable Joseph H. Young of this Court held that under the *O'Hara* standard the six-month limitations period contained in Md. Ann. Code Art. 49B, § 9(a), is the "most analogous" limitations period for employment discrimination suits in Maryland brought under Section 1981. Although Judge Young's holding in *McGill* has not been universally accepted by all the members of this Court, *see Evans v. Chesapeake & Potomac Telephone Co.*, 535 F. Supp. 499 (D. Md. 1982) (Miller, J.) (applying a three-year limitations period to employment discrimination claims brought under Section 1981); *Wilson v. Milke*, Civil Action No. HM-80-2214 (D. Md. March 17, 1982) (Murray, J.) (oral opinion) (applying a three-year period of limitations to an employment discrimination claim brought under Section 1981), it currently is the accepted view of the writer, *see McKee v. SCM, Corp.*, Civil Action No. R-79-162 (D. Md. January 29, 1982), and at least one other judge of this Court, *see Brice v. Crown Cork & Seal Co.*, Civil Action No. H-78-1207 (D. Md. January 15, 1982) (Harvey, J.) (oral opinion).

The last discriminatory act complained of by Hedman and Grattan, their termination, became effective July 31, 1976. They had been notified of their termination in June, 1976.[5] No claims based on their terminations or any other

[5] It would appear that limitations commenced on plaintiffs' termination claims in June, 1976, at the time the employment decision was made and communicated to them. *See Delaware*

incidents which now are claimed to have been discriminatory, were raised until February 17, 1977, more than six months after the fact. Claims specifically based on Sections 1981, 1983, and 1985, were not raised until October 13, 1981. Even assuming that these amended claims "relate back" to the time of the original filing of the bill of complaint, they are time barred under the applicable six month limitations period. Furthermore, even if the Court were to construe the claims as continuing in nature, which for the reasons previously stated, it does not, limitations would still be a bar since the last act complained of, termination, occurred more than six months prior to the filing of their lawsuits. The Court holds, therefore, that plaintiffs' claims for employment discrimination arising in Maryland under Sections 1981, 1983 and 1985 are barred by limitation.

As to plaintiffs' claims arising under Section 1986 in Count I, the one year limitations period prescribed by that statute governs. However, inasmuch as Section 1986 is derivative of Section 1985, where a party has failed to state a timely claim under Section 1985, there is no ground for relief under Section 1986. *See Schoonfield v. Mayor and City Council of Baltimore*, 399 F. Supp. 1068, 1087 (D. Md.) (and the numerous cases cited therein), *aff'd*, 544 F.2d 515 (4th Cir. 1975). Since plaintiffs' claims of employment discrimination arising under Section 1985 are time barred, the motion to dismiss their claims arising under Section 1986 will be granted.

As to plaintiffs' claims of employment discrimination in Counts I and II arising directly under the Maryland Constitution, the Court notes that there currently exists no authority for a cause of action for damages for violation of state constitutional rights. *See generally* Rees, *State Constitutional Law for Maryland Lawyers: Judicial Relief*

State College v. Ricks, 449 U.S. 250, 258-62 (1980). Even if the last date of employment, July 31, 1976, is the date limitations commenced, plaintiffs' claims would still be barred under a six month limitations period.

for Violations of Rights, 10 U. Balt. L. Rev. 102, 122 (1980). Even if such a cause of action could be said to exist, however, the applicable limitations logically should be the same as that controlling the federal right. *See Davidson v. Koerber,* 454 F. Supp. 1256 (D. Md. 1978) (cause of action under Article 23 of Maryland Declaration of Rights analogous to cause of action under 42 U.S.C. § 1983).

In Count III of the amended complaint Grattan asserts that he was discharged for advocating and supporting the establishment or foundation at Coppin of a "white students union." In Count IV of the amended complaint, Hedman asserts that she was discharged because she expressed opposition to a policy at Coppin which prevented certain transfer students from graduating "with honors". In Counts III and IV plaintiffs' allege that their discharge violated their First and Fourteenth Admendment rights and their rights secured by Article 19 of the Declaration of Rights of the Constitution of Maryland. The federal constitutional claims are brought pursuant to Section 1983.

Unlike the plaintiffs' claims for employment discrimination contained in Counts I and II of the amended complaint; their free speech claims in Counts III and IV are not controlled by a six month limitations period. Although the alleged First Amendment violations may have arisen in the same setting as plaintiffs' employment discrimination claims, this fact does not operate to divest plaintiffs of any other claims they might have. *Hall v. Board of County Commissioners of Frederick County,* 509 F. Supp. 841, 848 (D. Md. 1981); *see Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 459-60 (1975). Thus, as to these free speech claims, Art. 49B, § 9(a) of the Md. Ann. Code is not the most analogous limitations period and instead Maryland's general three year statute of limitations applies to plaintiffs' Section 1983 claims and state constitutional claims in Counts III and IV. *Hall v. Board of County Commissioners of Frederick County, supra.*

Plaintiffs' amended complaint, alleging for the first time free speech claims arising prior to July 31, 1976 (the date plaintiffs were terminated) was filed on October 13, 1981. As previously noted, the original complaint was filed on February 17, 1977. It is apparent, therefore, that plaintiffs' First Amendment claims, even under a three year period of limitations, are timely only if they related back to the filing of the original complaint.

Rule 15(c) of the Federal Rules of Civil Procedure provides in relevant part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

This rule "is based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the rights sought to be enforced." 3 *Moore's Federal Practice* § 15.15[2].

The critical element in determining whether the claim relates back under Rule 15(c), is whether the original complaint gave the defendants notice of the range of matters sought to be added by the amended complaint. *Wassel v. Eglowsky,* 399 F. Supp. 1330, 1359 (D. Md. 1975), *aff'd per curim,* 542 F.2d 1235 (4th Cir. 1976); *Schoonfield v. Mayor and City Council of Baltimore, supra,* 399 F. Supp. at 1090; *Goodman v. Poland,* 395 F. Supp. 660, 684 (D. Md. 1975). Amendments that do no more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the original complaint fall with in Rule 15(c). If, however, the alteration of the original statement is so substantial that it cannot be said that defendants were given adequate notice of the conduct, transaction, or occurrence that formed the basis of the claim, then the amendment will not relate back and will be time barred if the limitations

period has expired. 6 Wright & Miller, *Federal Practice & Procedure* § 1497 at pp. 491-92.

In the instant case, the Court finds that the original complaint filed by plaintiffs on February 17, 1977, did not put defendants on notice of plaintiffs' free speech claims which were added in Counts III and IV of the amended complaint filed on October 13, 1981. In the original complaint plaintiffs' alleged that they were illegally terminated because of untrue claims by defendants' that they had performed their duties in recruitment of "other race" students poorly. Although the complaint did not allege discrimination on the basis of either race or sex, under a broad interpretation of the notice provision it is arguable that defendants had notice of race and sex discrimination claims from plaintiffs' charges of discrimination which had been filed with the EEOC in August of 1976, prior to the filing of their complaint. As plaintiffs concede in their memorandum, however, their free speech claims were raised in neither the original complaint nor their Title VII charges of discrimination filed with the EEOC. It was only in October of 1981, over five years after the incidents in question, that plaintiffs stated claims under the First Amendment and alleged a factual basis for these claims. In view of all the circumstances, the Court finds that although governed by a three year prior of limitations, plaintiffs' free speech claims in Counts III and IV of the amended complaint do not relate back to the filing of the original complaint and, therefore, are barred by limitations and should be dismissed.

In Count V of the amended complaint, Grattan asserts a cause of action pursuant to Title VII. Grattan, however, has filed his Title VII claim in an independent lawsuit, R-81-3176, and, therefore, requests that Count V of the amended complaint in R-81-2914 be stricken. The motion to dismiss Count V of the amended complaint, therefore, will be granted.

For the reasons stated herein, it is this 17th day of September, 1982 by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motions to dismiss the Board of Trustees of the State Universities and Colleges of Maryland and the State of Maryland in R-81-2407 and R-81-3176, are GRANTED;

2. That defendants' motions to dismiss portions of the complaints in R-81-2407 and R-81-3176 as outside the scope of plaintiffs' charges to the EEOC are DENIED;

3. That defendants' motion to dismiss plaintiff Grattan's claims of sex discrimination in R-81-3176 is GRANTED;

4. That defendants' motions to dismiss plaintiff Hedman's claims in R-81-2407 arising before December 26, 1975, except for claims of unequal pay, is GRANTED;

5. That defendants' motion to dismiss plaintiff Grattan's claims in R-81-3176 arising before December 25, 1975, is GRANTED;

6. That defendants' motions to dismiss plaintiffs Hedman's and Grattan's claims for compensatory damages in R-81-2407 and R-81-3176, respectively are GRANTED;

7. That defendants' motion to dismiss the amended complaint in R-81-2914 is GRANTED; and

8. That the Clerk shall mail copies of this Memorandum and Order to all Counsel of record.

NORMAN P. RAMSEY,
United States District Judge

In The United States District Court
For The District of Maryland

Civil Action No. R-81-2914

James R. Grattan and Adrienne S. Hedman,
Plaintiffs,

v.

Calvin W. Burnett, Individually and in his official capacity as President, Coppin State College; J. Carson Dowell, Individually; Board of Trustees of the State Universities and Colleges of Maryland; Edmund C. Mester, Individually; Ronald K. DeSouza, Individually and in his official capacity as Vice-President of Student Affairs, Coppin State College and Harry Hughes, Governor of Maryland,

Defendants.

JUDGMENT
(dated September 17, 1982)

In accordance with the Memorandum and Order dated the 17th day of September, 1982, and filed in the above entitled case, it is

ORDERED and ADJUDGED:

That judgment is hereby entered in favor of the defendants and against the plaintiffs.

Norman P. Ramsey,
United States District Judge.